Dr. Eric Damian Kelly testified for the County as an expert on local government regulation of adult entertainment establishments. This expertise included his knowledge of the numerous municipal studies from around the country showing, describing, and analyzing the adverse impacts that are related to adult uses. In his professional responsibilities, Kelly has personally visited over 70 adult cabarets and over 70 adult book stores. He has reviewed over 20 different sets of adult use regulations adopted by local governments. He has extensive experience in analyzing for local governments the adverse secondary impacts that adult uses can have, as well as the regulations that local governments have used to reasonably address and, if possible, eliminate adverse secondary impacts. Kelly visited the adult use establishments operated in unincorporated Lake County, including the adult cabarets owned by Petitioners.

With regard to the adult bookstores, Dr. Kelly testified that both Forty-One News and Video Magic have adult booths. None of the adult booths at either establishment is monitored by management. At Forty-One News, several of the adult booths have "glory holes" created by drilling through steel plates to create perfectly round holes just below waist level in the walls separating one adult booth from another. Kelly repeatedly observed men loitering outside the adult booths (un-monitored by management) and then entering an adult booth as soon as the adjoining booth was occupied, ignoring the numerous other unoccupied booths. Based on his observations, as well as semen analysis done on the floors of other adult book stores with adult booths, Kelly believes that adult booths with glory holes are used by male customers for masturbation and other sex acts within and between adult booths. Kelly

testified that it was his opinion that the adult booth regulations in the County's Ordinance are reasonably related to preventing prohibited sexual activity.

With regard to the adult cabarets, Kelly visited both Petitioners Dancers and Babydolls adult cabarets. "Fantasy dances" cost $25 at Babydolls, and "lap dances" cost $20 at Dancers. Kelly described a "fantasy dance" he observed at Babydolls, in which a nude employee wrapped her breasts around a customer's face. Kelly testified that these types of activities often lead to improper and illegal conduct, including prostitution. It is Kelly's opinion that the eight-foot dancer-patron distance requirement in the County Ordinance is a reasonable requirement because: (i) it is enforceable, (ii) it ensures that there is no physical contact between dancers and customers, and (iii) it is reasonably related to preventing any illegal activity between dancer and patron.

Kelly also opined on the outside studies on which the County relied, including the Austin, Texas Study; the Garden Grove, California Study, the Houston Study, the Indianapolis Study, the Phoenix Study; and the Tucson Study. Kelly opined that the information and findings in these six studies are relevant to, and can be reasonably relied on by, the County and other local governments to support the type of adult use regulations that the County has adopted. Kelly further testified that the summary of these studies that was provided to the County Board was accurate, and that several of these studies were of publishable quality in serious, academic journals.

Finally, Kelly testified that information regarding actual prostitution convictions at adult use establishments is the type of information that is very useful and relevant

to local governments adopting adult use regulations. The experience that Lake County has had with criminal activity at its adult use establishments is consistent with the adult use experiences that other local governments have had.

Lake County Sheriff's Chief of Operations, Richard Eckenstahler, testified as a law enforcement expert. Chief Eckenstahler reports to the County Sheriff and is directly responsible for the day-to-day operations of the Sheriff's office. Eckenstahler has been employed by the Lake County Sheriff since 1979 and has held virtually every position within the organization. There is no one in the Sheriff's office more knowledgeable about criminal activity occurring within unincorporated Lake County.

Eckenstahler testified about the following specific instances of serious criminal activity at adult uses in unincorporated Lake County during his employment by the Lake County Sheriff.

- the closing of an adult cabaret known as the "Roman House" as a public nuisance in 1985 based on continuing acts of prostitution,
- an unprecedented instance of wired, "sweating" dynamite placed on the roof of an adult cabaret in the early 1980s,
- a patron at the adult cabaret now known as Petitioner Dancers being severely beaten by the bouncer of the cabaret,
- a 1989 arson incident of a fire intentionally set at Petitioner Dancers,
- a second arson incident at Petitioner Dancers in 1995 when a disgruntled patron purchased gasoline and set

the roof of the cabaret on fire while the cabaret was open for business and patrons were inside,

- a December 1996, Lake County Sheriff's undercover operation inside Petitioner Dancers when four Dancers employees, three dancers and one hostess, were arrested for and convicted of prostitution and solicitation,
- a January 2000, Lake County Sheriff's undercover operation inside Petitioner Babydolls when two dancers were arrested and convicted of prostitution,
- a December 1999 undercover reverse sting operation conducted in the parking lot adjacent to Petitioner Babydolls and Forty-One News resulting in several arrests and one conviction for solicitation,
- a 2001 reverse sting operation conducted in the parking lot adjacent to Petitioner Babydolls and Forty-One News resulting in multiple arrests and convictions for solicitation,
- an investigation by the Lake County Major Crimes Task Force that lead to the arrest and conviction of an employee of Forty-One News for first degree murder; the murder occurred at the Motel Motor Inn adjacent to Petitioner Babydolls and Forty-One News where the employee was renting a room.

Eckenstahler also testified to the summary of police reports and police responses prepared under his direction, and presented to the Lake County Board on October 9, 2001, that reveals 202 police reports generated at adult uses in unincorporated Lake County from 1979 through 2001 and 405 additional incidents requiring police intervention at said uses during the same time frame.

Eckenstahler conducted a supplemental study comparing January 1, 2000 to July, 2003 police reports and police interventions/incidents at adult uses in unincorporated Lake County to police reports and police interventions/incidents at similarly sized and located bars and taverns featuring other forms of live entertainment and non-adult bookstores, video stores and novelty stores in unincorporated Lake County. The bars and taverns selected for the study were among the busiest bars in unincorporated Lake County.

The study showed a far higher level of criminal activity, more total police reports and police incidents, at the adult uses than at the bars and non-adult stores. Petitioner Babydolls had 278 combined police reports and police interventions/incidents and Petitioner Dancers had 109 combined police reports and police interventions/incidents between January 1, 2000 and July 2003. The number of police reports and police interventions/incidents for the bars and taverns studied was far lower. There were far fewer sex-related crimes at the bars and taverns than at the adult cabarets. There was no prostitution at the bars and taverns within the study. Moreover, Eckenstahler testified that unlike the bars and taverns that were used for comparison purposes, the adult cabarets in unincorporated Lake County do not serve alcohol. All other factors being equal, establishments that serve alcohol would be expected to have higher levels of criminal activity than establishments that do not serve alcohol; there is a correlation between the sale and consumption of alcohol and crime. The adult stores in unincorporated Lake County – Forty-One News and Video Magic – had 102 and 33 combined police reports and police interventions, respectively, during the time of the study,

compared to 43 police reports and police interventions/incidents at all five of the County's non-adult bookstores, video stores, and novelty shops *combined*.

Eckenstahler testified that in his experience crime at adult uses in unincorporated Lake County is underereported; patrons who are victims of crime at adult uses are hesitant to report because they do not want it known that they were at an adult use. Eckenstahler opined that the level of crime at Lake County adult uses is higher than at other comparable uses in unincorporated Lake County. Much of the crime at and around bars and taverns is alcohol-related; however, the adult uses in unincorporated Lake County do not serve alcohol. More sex-related crime occurs at the County's adult uses than at the non-adult businesses.

Eckenstahler testified that when enforced, County licensing has proven to be an effective law enforcement tool. Eckenstahler stated that he believes that licensing adult uses would be effective in minimizing criminal activity at these establishments.

Petitioners note that they were not allowed to cross-examine Eckenstahler on the total number of prostitution charges initiated in incorporated and unincorporated Lake County, combined, from 2000 through 2003 because the introduction of this documentation was excluded as a discovery violation sanction. Petitioners fail to note, however, that they never raised this exclusionary ruling on appeal to the state appellate court and therefore were deemed to have waived the issue.

Andrea Usry is a Lake County Sheriff's Deputy who patrolled the midnight shift in the area of Babydolls and Forty-One News from 1997 to 2002. She considers this

area to be a "problem" in terms of criminal activity and encountered many instances of criminal activity in the area of Petitioner Babydolls and Forty-One News, including: (1) a man kicking a pregnant woman on the ground in the parking lot of Babydolls, (2) a child left unattended in a vehicle alone at 2:00 a.m. while his father was in Forty-One News, (3) two men having sexual relations in the Babydolls/Forty-One News parking lot, and (4) a dancer at Babydolls attacking another dancer with scissors.

In December 1999, Usry worked on an undercover prostitution reverse sting in the Babydolls/Forty-One News parking lot that resulted in three arrests and one conviction for solicitation. At that time, she gained information that led to the arrest and conviction of Jeremy Tweedy for obstruction and Jason Strong, an employee of Forty-One News, for murder of an unidentified woman found in a Lake County forest preserve. The murder occurred on the premises of the motel located adjacent to Petitioner Babydolls and Forty-One News. Usry testified that Strong lived in Room 206 of the motel.

Officer Cory Kelly is a patrol officer for the City of Waukegan, Illinois. On November 20, 2001, she participated in an undercover law enforcement reverse sting operation, posing as a prostitute in the Babydolls parking lot. During one, six hour detail, her work led to seven arrests and six convictions for solicitation.

According to stipulation introduced at trial, the autopsy of a woman found in the Greenbelt Forest Preserve in North Chicago in December 1999 revealed that the woman died from blunt force trauma to her head and that the victim's body was covered with bruises, burns, and other injuries consistent with whipping, hot wax

melted on her body, and various punctures and body piercings.

According to stipulation introduced at trial, the items found in Room 206 of the Motor Inn Motel in December 1999, included various adult videos, whips, candles, body piercing materials and tape.

At trial, none of Petitioners' witnesses undermined the County's evidence. Petitioners called Dr. Judith Hanna as an expert on dance as it relates to anthropology. Hanna offered opinions concerning erotic dancing at adult cabarets. Since 1995, Hanna has testified as an expert witness on erotic dance in 63 different lawsuits, all but one on behalf of adult uses against local governments regulating adult uses. Hanna reached her conclusions and wrote her report in this case prior to visiting Lake County or the Petitioners' establishments and only visited one of the two Petitioner adult cabarets for the first time the night before she testified. In her 63 different lawsuits, not one of her adult use clients had even one dancer or employee convicted for solicitation or prostitution from conduct within the adult cabaret.

Robert Bruce McLaughlin testified for the Petitioners as an expert in planning and zoning issues and municipal regulations regarding adult entertainment. McLaughlin opined on several studies that he believes demonstrate that adult uses do not cause secondary effects. None of these other studies or documents were admitted into evidence in this case and none of these studies or documents were part of the record before the County Board when it adopted its Adult Use Ordinance.

McLaughlin admitted (i) that two of the three volumes of his April 1 "report" were already "on the shelf" and any

new material in the third volume was prepared in less than 48 hours; (ii) that when he prepared his report he had not reviewed the Lake County Ordinance; (iii) that when he made his report he did not know that the County had relied on studies other than the Indianapolis and Austin studies; (iv) that his opinions in this case were made without ever having been to Lake County or to either of the Petitioners' establishments; (v) that, because he wasn't "given enough time" by Petitioners, his opinions in this case were made without ever having reviewed the report that the County's expert had prepared; (vi) that he did absolutely no field work or inspections in this case; and (vii) that he did not even write his own opinions in this case.

McLaughlin further acknowledged that he developed his opinions without any knowledge whatsoever of the prostitution and other convictions at Petitioners' Lake County establishments. McLaughlin testified that he is concerned that he did not have this information and that to this extent his work in this case is less valuable to the court. McLaughlin further stated that his testimony was limited to outside studies and not on whether Petitioners' establishments have problems or cause secondary effects. He acknowledged that Illinois prostitution convictions at Petitioners' establishments would be a concern to him and might have impacted his opinions on whether adult uses in Lake County cause adverse impacts.

Michael Crissman, the owner and operator of Petitioner "Dancers" adult cabaret, testified to various illegal conduct occurring at his establishment, including: (1) an incident when a disgruntled patron left Dancers, purchased gasoline, returned, and set the cabaret on fire; (2) a 1990 incident when a Dancer's patron got in a dispute

with a dancer that escalated into a fight between the patron and Crissman that left the patron severely injured and lead to Crissman's conviction for aggravated battery; (3) a 1991 fight that Crissman got into with another patron in which punches were exchanged; and (4) a 1996 undercover operation by the Lake County Sheriff's Office inside Dancers, when four Dancers employees were "hired" by an undercover police officer to perform a "party," including lap dances, which conduct of the four employees lead to their arrest, trial, and ultimate 1998 convictions for prostitution.

Contrary to Petitioners' Statement of the Case, Petition, p. 7, there was no evidence at trial that requiring Dancers to close at midnight would result in the loss of 75% of Petitioner XLP's revenue. Nor was there any evidence that the business could not continue to operate under the County's Ordinance. Petition p. 12. The only testimony was that the current configuration and operation were not in compliance with the County's Ordinance.

Danny Christofalos, the owner and operator of Petitioner "Babydolls," also testified. Babydolls is an adult cabaret with a common wall with the adult bookstore Forty-One News and shares a parking lot with the Motel Motor Inn, located approximately 200 feet to the south of Babydolls. Christofalos testified that in January 2000, a Babydolls waitress and a Babydolls dancer were arrested and convicted for solicitation and prostitution, respectively, for activities that took place within Babydolls. Christofalos testified that he would fire any of his employees who break the rules regarding improper behavior with customers. However, neither of these women was ever reprimanded or fired after their conviction.

Christofalos also testified that notwithstanding recently installed surveillance cameras, posted dancer rules, and monitoring by company personnel, dancers at Babydolls continued to violate the rules regarding improper contact with customers. Contrary to Petitioners' Statement of the Case, Petition, pp. 7, 12, there was no testimony from Christofalos that Babydolls would have to close if it had to comply with the Ordinance. Christofalos merely testified that compliance with the County's Ordinance would require Babydolls to make unspecified changes to the format to its entertainment.

Diana Lancaster, the head dancer at Petitioner Dancers, testified that she can effectively communicate her erotic message as a dancer on a stage eight feet away from patrons.

On November 25, 2003, the state trial court entered a directed finding in favor of the County on Count V and entering judgment in favor of the County on Counts I and II of the Third Amended Complaint. *See* Petition, Appendix B. The state trial court also made extensive oral findings (Appendix 1), all of which are incorporated into its written judgment order. Petition, Appendix B.

The trial court made the following findings with respect to Petitioners' equal protection claim:

- the age restriction on adult cabarets is not subject to strict scrutiny;
- the court may hypothesize as to reasons that the restriction is rational even if that reason is not articulated by the legislature in enacting the restriction;

- the County may have reasonably believed that 18-year-olds lack the maturity and experience of 21-year-olds and wanted to prevent after-prom parties and other high school gatherings at establishments featuring live nude dancing;

- a rational bases for the age restriction exists and the Petitioners failed to negate every conceivable basis for the restriction.

Appendix 1, pp. 4-5.

The trial court made the following findings with respect to Petitioners' challenge to the factual predicate to the Ordinance:

- contrary to Petitioners' contention in their Statement of the Case, *see* Petition, p. 11, the state trial court found that the correct test for judging the constitutionality of the County's Ordinance is set forth in *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986) and *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002), to wit: 1) whether the Ordinance imposes a total ban on adult uses or contains time, place and manner regulations, 2) whether the Ordinance is content based or content neutral, and, if the Ordinance is content neutral, 3) whether the Ordinance serves a substantial governmental interest and allows reasonable alternative avenues for communication of protected speech;

- the County's Ordinance does not ban all adult uses but restricts the time, place, and manner of performances and other activities;

- the stated purpose for the enactment of the Ordinance is to address negative secondary effects;

- in enacting the amended Ordinance in 2001, the County Board could have reasonably believed that the

evidence and information presented to it was relevant to the problem of negative secondary effects from adult uses;

- the evidence presented to the County Board in 2001, included: 1) a summary of studies of secondary effects from other municipalities that, according to the County's trial expert, were of academic peer review quality, 2) a report presented by a local law enforcement officer reflecting over 200 police reports and over 400 police responses at adult uses in unincorporated Lake County, 3) information provided by that same local law enforcement official concerning prostitution convictions at the Petitioners' businesses, and 4) the law enforcement officer's opinion that a disproportionate amount of criminal activity occurs at and around adult uses in unincorporated Lake County;

- the Ordinance was supported by evidence at trial that the County Board could have reasonably believed to be relevant to the problem of negative secondary effects at adult uses in unincorporated Lake County and that justified enactment of the Ordinance, including:

    - none of Dr. Hanna's other adult use clients had even one prostitution conviction;

    - McLaughlin admitted that he was unaware of the prostitution and solicitation convictions at Petitioners' businesses, that such information would have been important in formulating his opinions, and that his opinions in this case were therefore less valuable to the court;

    - "considerable" evidence of prostitution and solicitation convictions in and outside of the Petitioners' businesses between 1996 and 2001, including four convictions for prostitution and solicitation inside Dancers, two convictions for prostitution

and solicitation inside Babydolls, seven arrests for solicitation at the Babydolls parking lot, resulting in six convictions for solicitation;

- four undercover operations conducted by law enforcement at Petitioners' establishments between 1996 and 2001, each resulting in prostitution-related convictions;
- Chief Eckenstahler's opinion on disproportionate incidence of crime and police interventions at adult uses in unincorporated Lake County as confirmed by the results of the comparative study conducted under his direction;
- testimony that one female law enforcement officer posed as a prostitute in six undercover operations at different locations and made twenty arrests for solicitation during those operations; seven occurring in one reverse sting operation at the Babydolls parking lot;
- Deputy Usury's testimony that the Video Magic/ Babydolls/Forty-One News area is a "problem," with examples of illegal conduct, including sex acts in a car between two men in the Babydolls parking lot, a Babydolls dancer threatening another dancer with scissors, a pregnant woman beaten in the Babydolls parking lot, and a six-year-old child left in a locked car at 2:00 a.m. while the father was inside an adult bookstore;
- testimony of the Forty-One News manager that waste baskets in the adult booths were repeatedly set on fire, that on a daily basis more than one person attempts to enter an adult booth, that on a daily basis unwelcome patrons must be asked to leave, and that the "worst" time for improper activity is between 9:00 p.m. and 3:00 a.m.

Appendix 1, pp. 5-10.

On appeal to the Illinois Second District Appellate Court, Petitioners challenged only the state trial court's rulings with respect to Count I (equal protection violation), II (evidentiary predicate for the Ordinance), and IV (unbridled discretion in requesting certain information from license applicant). Significantly, Petitioners did not challenge or raise an issue on appeal with respect to any of the trial court's evidentiary rulings.

On May 26, 2005, the Illinois Second District Appellate Court issued its unpublished decision in which it conducted a thorough and reasoned analysis of existing United State Supreme Court precedent. *See* Petition Appendix A, pp. 6a-14a. Contrary to Petitioners' position, the appellate court delved deeply and "directly into the facts of the bench trial" (Petition, p. 3), summarizing much of the relevant testimony evidencing the existence of negative secondary effects at and around the Petitioners' businesses. *See* Petition Appendix A, pp. 15a-22a. In affirming the trial court's judgment, the state appellate court found that "the evidence on the record adequately demonstrates a substantial connection between the ordinance and the secondary effects it is targeted at controlling." Petition, Appendix A, p. 25a.

The state appellate court published its decision on July 8, 2005. *XLP Corp. v. County of Lake*, 359 Ill. App. 3d 239, 832 N.E.2d 480 (2nd Dist. 2005).

## REASONS FOR DENYING THE PETITION

### I. Introduction

Petitioners present two bases for this Court to grant certiorari: 1) to resolve purported conflicting interpretations of prior decisions of this Court by other lower courts, and 2) to review the adequacy of the evidence of negative secondary impacts introduced at trial. Petition, "Questions Presented," p. i. Whatever alleged inconsistent standards Petitioners complain other lower courts have applied to analyzing regulations on adult uses is of no consequence here. There is no dispute that the state trial and appellate courts in this case properly followed this Court's dictates and any further ruling from this Court on the topic would be entirely advisory in nature. As to the second question raised in support of certiorari, Petitioners merely seek to have this Court reweigh the extensive evidence introduced at trial. Disagreement over a lower court's factual findings is not a proper basis for granting the extraordinary writ of certiorari. The Petition should be denied.

### II. Petitioners Complain of Alleged Erroneous Factual Findings by the State Trial and Appellate Courts

Rule 10 of the Rules of the Supreme Court sets forth the considerations that govern this Court in exercising its discretionary power to grant a petition for certiorari. The reasons for granting certiorari include a decision of a circuit court of appeals that conflicts with another circuit court of appeals on the same important matter, a state court of last resort has decided an important federal question in a manner that conflicts with a decision of another state court of last resort or circuit court of appeals,

or a state court has decided an important question of federal law that has not been decided by this Court or in a way that conflicts with prior decisions of this Court.

This case presents none of the circumstances for review set forth in by Rule 10. Rather, it involves the decision of an intermediate state court (the Illinois Second Judicial District Appellate Court – the Illinois Supreme Court denied leave to appeal), relating to a subject that has been the focus of several recent decisions of this Court (the evidentiary foundation necessary to justify the adoption of regulations governing adult uses), in a holding that is entirely consistent with this Court's rulings in, among others, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), *City of Erie v. PAP's A.M.*, 529 U.S. 277 (2000), and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002).

In fact, the state appellate court carefully reviewed and analyzed this Court's prior relevant decisions and correctly set forth the established standards for judging whether an adequate factual predicate has been established to support adult use regulations. Petition, Appendix A, pp. 6a-14a. Notwithstanding conclusory statements to the contrary, Petitioners never directly challenge the state appellate court's restatement of the applicable guiding legal standards nor do they articulate the holdings of this Court that the state appellate court allegedly ignored.[3]

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[3] Petitioners do, however, misstate the standard that the state trial court actually applied to Petitioners' "factual predicate" challenge, incorrectly suggesting that the trial court applied a rational basis review. *See* Appendix 1, p. 6; Petition, Appendix A, p. 22a.

Petitioners do take issue with several evidentiary rulings by the state trial court, such as the rulings sustaining the objections to a line of questioning of one of the County's attorneys (*see* Petition, p. 5), and the exclusion of information on the total number of prostitution prosecutions initiated in Lake County from 2000 through 2003 (*see* Petition, p. 10). However, in addition to the fact that routine civil trial court evidentiary rulings seem particularly unworthy of review by certiorari, these particular rulings were never raised on appeal below, and, of course, "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not consider it." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148, n.2 (1970); *Lawn v. United States*, 355 U.S. 339, 362-63, n.16 (1958).

What Petitioners complain most vehemently about in the first half of the Petition, is the factual findings and credibility determinations made by the trial court and affirmed by the appellate court. However, a "petition for writ is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rule 10, Rules of the Supreme Court. This Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). Nor is this a case, *see* Petition, pp. 3-4, n.2, where the Court must consider the specific facts to make a determination whether or not a constitutionally protected interest is at stake. *Compare Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927) (obscenity case); *Jacobellis v. Ohio*, 378 U.S. 184 (1964) (same).

Petitioners cite to Justice Kennedy's concurrence in *Alameda Books* and complain that the state trial and appellate courts did not adequately consider whether the Ordinance impacted a greater than necessary "quantity of

speech." Petition, pp. 12, 15. However, Petitioners presented no evidence at trial to support any argument that the Ordinance would require the demise of any or all adult uses within the County. Petition, pp. i and 12. More fundamentally, the County's Ordinance, unlike the "dispersion" regulation at issue in *Alameda Books*, does not govern the location (or relocation) of adult uses. Thus, this case does not present any threat that the Ordinance, by design or effect, will significantly reduce the "quantity of speech" by eliminating existing outlets for protected speech. Rather, this case involves nothing more than typical adult cabaret operational regulations that have uniformly been upheld by courts across the country – *buffer zone*, *see e.g.*, *Kev, Inc. v. Kitsap County*, 793 F.2d 1053 (9th Cir. 1986) (ten-foot buffer upheld); *Colacurcio v. City of Kent*, 163 F.3d 545, 553-54 (9th Cir. 1998) (reaffirming *Kev*); *Ino Ino, Inc. v. City of Bellevue*, 937 P.2d 154, 167-71 (Wash. 1997) (*en banc*) (eight-foot); *ban on total nudity*, *see City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000); *Barnes v. Glen Theater*, 501 U.S. 560 (1991); *tipping restrictions*, *Kev*, 793 F.2d at 1062; *City of Colorado Springs v. 2354*, 896 P.2d 272, 298 (Colo. 1995); *elevated stage*, *LLEH, Inc. v. Wichita County, Texas*, 289 F.3d 358, 368 (5th Cir. 2002), *cert. denied*, 537 U.S. 1045 (2002); *BSA, Inc. v. King County*, 804 F.2d 1104, 1111 (9th Cir. 1986); *Kev*, 793 F.2d at 1061; *City of Colorado Springs*, 896 P.2d at 298; *hours of operation*, *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153, 1159 (9th Cir. 2003), *cert. denied*, 541 U.S. 973 (2004); *DiMa Corp. v. Town of Hallie*, 185 F.3d 823 (7th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2002).

Thus, the Rule 10 considerations governing the granting or denial of certiorari all weigh heavily against Petitioners.

## III. Petitioners' Allegation that Lower Courts Have Misconstrued this Court's Dictates Does Not Justify Granting Certiorari

The second half of the Petition amounts to little more than a critique of *other* courts' alleged misapplication of this Court's precedents, Petition, pp. 21-29, and Petitioners' perception that an advisory opinion from this Court is necessary to "establish an unequivocally 'clear set of principles,'" for every court in the country "to apply consistently and with precision." Petition, p. 15. But certiorari jurisdiction is reserved for issues whose importance is "beyond the academic," *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955), and, in the end, the fact that *other* courts may not have followed this Court's mandates does not warrant the granting of certiorari from a court that did.

In particular, Petitioners suggest that certain other courts may have erroneously upheld adult use regulations: 1) in the absence of any evidence of negative secondary impacts, 2) in the absence of any pre-enactment evidence, 3) based entirely upon anecdotal evidence, or 4) without affording an adult use any opportunity to challenge the local government's evidence of secondary effects. Petition, pp. 21-29. But this case suffers from none of these perceived deficiencies. Here, the state trial and appellate courts found that adequate pre-enactment evidence of negative secondary effects was present and could reasonably have been relied upon by the County Board. Petition, Appendix A, pp. 12a-13a; Appendix 1, p. 8. Moreover, the state trial and appellate courts held that the County adduced considerable additional specific and non-anecdotal evidence of such negative impacts at trial, Petition, Appendix A, p. 23a; Appendix 1, pp. 8-10, and

that this additional evidence demonstrated a "substantial connection between the ordinance and the secondary effects it is targeted at controlling." Petition, Appendix A, p. 25a; Appendix 1, p. 8. The evidence was clear at trial – no fewer than 13 sex crime convictions and other criminal activities have taken place in the years immediately proceeding and following enactment of the Ordinance *at the Petitioners' establishments.* Petitioners were given a full trial with ample opportunity to "cast doubt" and challenge the County's evidence concerning the basis for enacting the Ordinance; Petitioners simply could not overcome the overwhelming evidence. Petition, Appendix A, p. 24a; Appendix 1, pp. 7-8.

Petitioners would have this Court engage in an academic exercise to address perceived ambiguities in this Court's earlier rulings and alleged conflicts between *other* lower courts not properly raised by the facts or the law applied in *this* case. Petition, pp. 21-29. Respectfully, the Court should decline such an open-ended invitation.

## CONCLUSION

Respondent prays that the Court deny Petitioners' petition for writ of certiorari.

Respectfully submitted,

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## APPENDIX 1

Court Caption for Jasica Appendix

| | |
|---|---|
| XLP Corp., d/b/a "Dancers", Michael J. Christofalos and Danny Christofalos, d/b/a "Baby Dolls", George Stamatopoulos, d/b/a "Video Magic" and Forty One News, Inc., d/b/a "41 Books", | Case No. 98 CH 1106 |
| Plaintiffs, | Circuit Court of the Nineteenth Judicial Circuit |
| v. | Lake County Ill. |
| County of Lake, | |
| Defendants. | |

[1] THE COURT: I reserved on Count – on the County's motion for directed finding as to Count Five. I will rule on that motion for a directed finding now.

I will grant the motion for a directed finding on Count Five. In Count Five of the complaint, plaintiffs allege that tipping restrictions of Section 13 of the ordinance denied plaintiffs their due process right to earn a living. Section 13.C provides as follows: Tipping. No tip or gratuity from any adult establishment patron may be offered or accepted for any performance by an adult establishment employee on any adult cabaret stage at any time prior to the completion of any such performance. No adult establishment patron shall offer and no adult establishment employee having performed on any cabaret stage shall accept any form of tip or gratuity offered directly to the employee by the adult establishment patron. Rather following completion of a performance all tips and gratuities to adult establishment employees performing any cabaret stage

shall be placed into a receptacle provided for receipt of such tips and gratuities by the adult entertainment establishment.

Count Five specifically claims that in position of a taping [sic] receptacle totally destroys the ability of an individual performer to obtain benefit derived from her [2] individual legal performance efforts and this arbitrary restriction destroys the performer's right to earn a living.

Dr. Hanna did testify that tipping during a performance is important because tips serve to acknowledge that a patron is getting the dancer's message and is part of the dance performance. Dr. Hanna said that if there are no tips there is no feedback for the dancer. Dr. Hanna did not testify concerning the economic or financial consequences of different types of tipping; that is, tipping during a performance versus tipping after a performance nor did she testify concerning the consequences between handing a tip directly to a dancer versus placing a tip in the receptacle. Actually no evidence was presented on the financial impact of Section 13.C.

As to Dr. Hanna's concern of feedback to the dancers, there are alternative means for patrons to give feedback. As was stated in Kev, K-E-V, v. Kitsap, K-I-T-S-A-P, 739 – that is wrong. 793 F. 2d 1053 at 1062, Ninth Circuit, 1986, "While the tipping prohibition may deny patrons the means of expressing pleasure with the dancer's performance" – let me start that quote again.

"While the tipping prohibition may deny patrons one means of expressing pleasure with the dancer's performance, sufficient alternative methods to communicate [3] exists for the patrons to express the same message."

Additionally, the fact that a regulation will result in lost profits as – or higher overhead or require establishments to pay dancers more doesn't make the regulation unconstitutional. Tily B, T-I-L-Y-B, v. Newport Beach, 81 Cal. Rptr. 2d 6. California Appellate Court, actually Court of Appeals, 1998, and Colacurcio, C-O-L-A-C-U-R-C-I-O, v. Kent, 163 F. 3d 545 at pages 556 and 57, Ninth Circuit, 1998.

Under Section 13.C there is no ban on tipping, merely restriction on how tips are to be transferred to a dancer. The restriction does not prevent dancers from working, being paid, or receiving tips or earning a living. See DCR v. Pierce County, 964 P. 2d 380, Washington Court of Appeals, 1998.

It seems to me that plaintiff's claim in part assumes that Section 13.C would permit only one receptacle for tips where tips for all dancers would have to be jointly placed. While the issue isn't before me, then interpretation does not seem to be required by the statute, by the ordinance.

Finally, this restriction on tipping is rationally related to the County's interest in lessening opportunity for prostitution and other illegal activity facilitated by [4] the close contact between patrons and employees. The motion for directed finding is granted as to Count Five.

I will hold off on the rest. I will rule about three o'clock on the other remaining parts. Court is in recess until three. Thank you very much.

(A recess was had.)

THE COURT: Thank you for waiting. I have reviewed all the evidence, all the paperwork submitted. I am prepared to rule on the other two counts.

Count One alleges that the restrictions in the ordinance violate the Equal Protection Doctrine on their face and as applied. Because restrictions are arbitrary and unreasonable, the unreasonably-imposed restrictions on adult establishments not imposed on non-adult businesses.

Additionally, Count One claims that the – that requiring patrons and employees of adult cabarets to be at least 21 years old violates the Equal Protection Clause because patrons and employees of adult stores, adult theaters, and adult – because patrons and employees of adult stores, adult theaters need only be 18 years of age.

I find that there is no form of protected association presented here for any protective class or suspect classification. As a result, the rational basis test is applicable. Legislation examine [sic] only for [5] rationality enjoys a strong presumption of validity because a legislative body has brought [sic] discretion and created classifications and is allowed great flexibility in addressing different needs. Accordingly, rational basis review is limited and highly differential and a paradigm of judicial restraint and the burden is on the challenger to negative [sic] every conceivable basis that might support it.

To meet the test, it is not necessary that the legislative body describe its goal or articulate its purpose in enacting the ordinance. The Court may hypothesize reasons for the law even if the reasons didn't motivate the legislative body. As long as there is any reasonable conceivable state of fact showing the act is rational, the act must be upheld. That is basically a statement from Arangold, A-R-A-N-G-O-L-D, v. Zehnder, Z-E-H-N-D-E-R, 329 Ill. App. 3d 781, First District, 2002, which is a tax case

which I know is different but cites all the leading cases on the rationale review from both statements that I made.

The only provision of the ordinance I will specifically mention here is a provision specifically mentioned in Count One; namely, that a person has to be at least 21 years of age to be a patron or to be employed by an adult cabaret. This provision does bear rational relationship to the legitimate state interest of protecting [6] young persons between 18 and 21 years who may lack maturity and experience of older adults and may be more vulnerable than older persons.

It certainly may have been the County's desire in part to prevent after-prom parties or other gatherings of high school students at this type of business establishment. Indeed, the preamble to the ordinance cites the protection of young people and students. Age, I should say, or similar age restrictions have been upheld. See C-O-R-P v. Board, 799 P. 2d 917, Colorado, 1990, and Burnett v. San Francisco Company, 42 Cal. Rptr. 879, 1995. The latter case does not have to do with adult cabarets, but is an age restriction on dance halls.

As to the other restrictions of the ordinance attacked in Count One, I find that the plaintiff has not negated every conceivable basis supporting the restrictions and that the restrictions at least for the purpose of the equal protection challenge and, in fact, the evidence presented here establishes the restrictions are rationally related to the County's stated purposes. So judgment is entered for the defendant on Count One.

Count Two. Ordinances regulating the conditions under which adult entertainment businesses may operate are analyzed as a time, place, and manner regulation

pursuant to [7] the City of Renton, R-E-N-T-O-N, v. Playtime, 475 U.S. 41, 1986; and Los Angeles v. Alameda, 535 U.S. 425, 2002.

A Court must first determine whether the ordinance imposes a total ban on adult uses or myriadly time, place, or manner restrictions.

Second. Assuming the ordinance is found to be a time, place, and manner regulation, the Court must decide whether the ordinance is content based or content neutral. If the ordinance is content based, the subject restricts scrutiny. If it is content neutral, it is subject to immediate scrutiny.

Third. If it is content neutral and therefore subject to immediate scrutiny, the Court must then decide whether the ordinance will comply with the services substantial governmental interest and permits reasonable avenues of alternative communication.

Applying this test to the ordinance in question, I first find the ordinance does not ban all the adult uses. It establishes restrictions on time, place, and manner of performances, and other activities.

The next inquiry is whether the ordinance is content neutral; that is, whether the ordinance is aimed at the content of the activity at the adult establishments or at the purported secondary effects of the establishments on [8] the surrounding community. "In determining whether a regulation is content neutral, the government's purpose in enacting the regulation is the controlling consideration." L.L.C. v. Aurora, 136 F. 3d 683 at 686, 10th Circuit, 1998.

Quoting from Ward v. Rock, 491 U.S. 781 at 791. "In determining the legislative body's intent, a Court can look

to the text of the ordinance, any preamble or expressed legislative findings, or stated purpose of the regulation." Ben's Bar v. Somerset, 316 F. 3d 712 at 723, footnote 28, Seventh Circuit, 2003. S.O.B. v. Benton, 317 F. 3d 856 at 862, Eighth Circuit, 2003. Carandola, C-A-R-A-N-D-O-L-A, v. Bason, B-A-S-O-N, 303 F. 3d 507 at 514, Fourth Circuit, 2002.

Here the ordinance by its terms including the recitals in the preamble to the original ordinance, Joint Exhibit 3, which are incorporated into the ordinance amending the Lake County Adult Use Licensing Ordinance, Joint Exhibit 4, is designed to prevent crime, prevent the deterioration of neighborhoods, protect stability of other businesses, and protect property values, and the health, safety, and general welfare of the county and its residents.

As a result, I find at least the stated purpose of the ordinances address the purported secondary effects and not suppress unpopular speech and; therefore, content [9] neutral and subject to immediate scrutiny.

As to the third stage of the analysis, the government must reasonably believe the evidence it relies on is relevant to the problem of secondary effects it seeks to address. Also the government's evidence must fairly support its rationale. Further, a plaintiff challenging the ordinance must be given an opportunity to cast direct doubt on the purported rationale either by demonstrating that the municipality's evidence doesn't support its rationale or by furnishing evidence that disputes municipality's factual findings.

If the plaintiff succeeds in casting doubt on municipality's rationale in either manner, then the burden shifts back to the municipality to supplement the record with

evidence renewing support for a theory that justifies its ordinance. It's Renton, 121 S. Ct. at 736. And Peek-A-Boo at 337 F. 2d 1251.

After reviewing the transcript of the proceedings of 10/9/01, I find that the evidence relied upon by the County Board in enacting the amended ordinance could reasonably be believed to be relevant to the problem of secondary effects and that the evidence fairly supports the County's rationale. At least some of the summaries – strike that, At least some of the studies summarized for [10] the Board according to Dr. Kelly, were academic journal quality could be published, and he did do peer – he did review publications for peer review journals.

In addition, a local law enforcement official testified 200 reports of criminal activity and twice as many interventions to assist at adult businesses. He testified as to his opinion that there is more criminal activity at adult businesses and he testified the convictions for prostitution at these businesses.

Assuming that the plaintiff has cast doubt on the County's rationale, I find that the additional evidence presented at the trial more than supports a theory justifying the ordinance. One important part of the evidence is the evidence of actual prostitution and solicitation convictions in and outside of the plaintiff's businesses. This is important because curtailing public sexual contact and sexual criminal offenses represents a significant state interest.

Dr. Hanna stated that in the 63 times she has testified as an expert in exotic dance cases, in none of those cases were there even a single prostitution conviction. Mr. McLaughlin testified that prostitution convictions within

five years would impact his opinions on secondary effects and that he didn't have information on [11] prostitution convictions before he formulated his opinions in this case and normally he would have had such information and that his testimony in this case was less valuable to the Court than in other cases where he had the information.

The evidence of prostitution and solicitation here is considerable, at least what I would consider considerable, based on the evidence including the four prostitution convictions at Dancers in 1997, two convictions in 1998 at Baby Dolls, three solicitations and an undercover operation in December 1999 at and near – 1999 at and near Baby Dolls, Officer Kelly's seven arrests for solicitation in 2001 at or near Baby Dolls resulting in six convictions and a seventh person having possession of a gun.

As far as the evidence shows, there have been four undercover operations, prostitution operations between 1996 and 2001 each of which resulted in convictions. I suppose, you know, undercover investigations could be classified as secondary effect. How much time and money and effort does a police department want to put into going into cabarets and other types of places to determine whether there is prostitution.

Also significantly here Officer Kelly testified that in her career she has posed as a prostitute six times with a total of about 20 arrests. It is significant that [12] seven of the 20 of those arrests came from her single outing at Baby Dolls. In addition, Chief Eckenstahler testified to his opinion that the type of adult uses, that these types of adult uses have higher incidents of crime and police interventions and that is certainly supported by Defendant's Exhibits 32 through 46.

Officer Usry testified that Route 173 and 41 was a problem area and backed up that opinion with examples. One example was two men engaged in a sex act in a car in Baby Dolls's parking lot. A dancer pulling scissors on another dancer. A pregnant woman being beaten in the parking lot between Baby Dolls and the gas station. A six year old being left in a truck at two a.m.

In addition, Ms. Kelly testified they had to prohibit waste baskets in the video viewing rooms because people set them on fire. That on a daily basis more than one person tries to get into a viewing booth with another person which is against the rules. And daily she had to ask people to leave 41 News. She testified that between nine p.m. and three a.m. is the worst time in the store.

All of this together with the other evidence of arson and dynamite and one murder and the out-of-state studies certainly seems to me to support the County's ordinance in attempt to lessen secondary effects. I think [13] County Board members could reasonably believe that these types of things, waste baskets being set on fire, prostitution, pregnant women being kicked in the parking lot, six year old left at two a.m., two men engaging in sex act in the parking lot were less likely to occur in or near bars or at or near Blockbusters, in or near Panara [sic] Bread or other business establishments.

I will mention a couple other things. As far as minimum distance requirements go, there is no constitutional guarantee to the maximum erotic experience possible. And according to Ms. Lancaster whose testimony I find in its entirety to be credible, said she can still communicate her same message at eight feet.

Similarly, the 18-inch stage elevation and the barrier of three feet found in the ordinance are reasonable restrictions and do not interfere with plaintiff's constitutional right to exotic dancing. Time restrictions is found in the ordinance have been upheld. Schultz v. Cumberland is one example, 228 F. 3d 831, Seventh Circuit, 2000. That was ten a.m. to midnight.

Also evidence supporting the sign restrictions from Mr. Johnson, see in that regard D.J. v. Houston, 837 F. 2d 1268, Fifth Circuit, 1988. Nudity – a ban on nudity has been upheld. Youth restrictions have been upheld also.

[14] Also I want to note that the requirement of narrow tailoring does not require the least restrictive means or the least restrictive alternative. I also want to note that I recognize that it may be argued that the O'Brien test rather than the Renton test should be used to evaluate this ordinance or at least parts of this ordinance. If so, my decision would be the same. Since the second prong of the O'Brien test and the third prong of the Renton test are in my opinion virtually indistinguishable.

As a result, the relief requested in the third amended complaint by the plaintiff is denied. Judgment is entered in favor of the defendant on all the remaining counts.

All I want is a written order that says for the reasons stated in open court directed finding is entered on Count Five and judgment in favor of defendants entered on Counts One and Two, the only remaining counts, for the reasons stated in open court and then list this court reporter's name and address in the order.

Gentlemen and lady, all the documents, all the exhibits are going to be admitted into evidence so make sure the clerk has the right ones. I think they are all here.

Before I ask if there is any further, I do want to thank the attorneys, each of the attorneys on the record for [15] a very professional presentation of all the evidence and all the legal arguments.

Do we have anything else that we need?

MR. FRIEDMAN: Nothing additional from the plaintiffs at this time, Judge, except we express our gratitude for your time in this case.

THE COURT: You are more than welcome. Feeling is mutual. I know you people made the same effort to have all this time. Thank you.

(Which was all the evidence offered and received on said date in said cause.)

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